

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

ORIGINAL

74-1607

United States Court of Appeals

For the Second Circuit.

MIKE O'HARA,

Plaintiff-Appellant,

-against-

MOORE-McCORMACK LINE, INC.,

Defendant-Appellee.

*On Appeal From The United States District Court
For The Southern District Of New York*

Appellant's Appendix

RASSNER AND RASSNER
Attorneys for Plaintiff-Appellant
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MIKE O'HARA,

Plaintiff,

-against-

MOORE-McCORMACK LINES, INC.,

NOTICE OF APPEAL

70 Civ. 4011
(RJW)

Defendant.

S I R S:

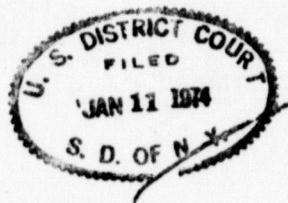
PLEASE TAKE NOTICE that the plaintiff MIKE O'HARA hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment entered on the 11th day of January, 1974 on a Jury special verdict in favor of the plaintiff in the sum of \$8,140.00 and finding the plaintiff guilty of contributory negligence to the degree of 75%, reducing the amount of the award to \$2,035.00, and from the order of the Court denying the plaintiff's motion to set aside the verdict on the ground of inadequacy and granting a new trial.

Dated: New York, N.Y.
January 30, 1974.

Yours, etc.,
Reeb K. Janet
RASSNER & RASSNER
Attorneys for Plaintiff
Office & P.O. Address
15 Park Row
New York, N.Y. 10038
212 - 227 - 2618

TO:

HYDE, DICKERSON & REILLY, ESQS.,
Attorneys for Defendant
61 Broadway
New York, N.Y. 10006

JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
 MIKE O'HARA, : 70 Civil 4011(RJW)
 Plaintiff,
 -against- : JUDGMENT
 MOORE-McCORMACK LINES, INC., : # 74,053
 Defendant.
 ----- X

The issues in the above entitled action having been brought on regularly for trial before the Honorable Robert J. Ward, United States District Judge, and a jury on January 2, 3, 4, 7, 8 and 9, 1974, and the Court having submitted the attached special verdict to the jury, and the jury having answered the said special verdict as indicated thereon, and the jury having returned the special verdict in favor of the plaintiff in the amount of \$8,140.00., and the jury having further found that the plaintiff contributed to the negligence to the degree of 75% thereby reducing the amount of the award to \$2,035.00., it is,

ORDERED, ADJUDGED AND DECREED, that plaintiff, MIKE O'HARA, have judgment against the defendant, MOORE-McCORMACK LINES, INC., in the amount of \$2,035.00.

Dated: New York, N. Y.
 January 10, 1974

MICROFILM
 JAN 11 1974

Robert J. Ward
 Clerk

APPROVED:

Robert J. Ward
 United States District Judge

VERDICT

A-4

CLIFTON SPRINGS DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL O'HARA,

Plaintiff,

VERDICT

-against-

70 Civ. 7611

MOORE-McCORMACK LINES, INC.,

Defendant.

1. Has plaintiff established his claim that the ship S.S. BRAGG was in an unseaworthy condition and that this unseaworthiness was a proximate cause of plaintiff's accident? (Answer yes or no) No

2. Has plaintiff established his claim that the defendant was negligent and that its negligence was a proximate cause of plaintiff's accident? (Answer yes or no)

YES

3. If the answer to both Questions 1 and 2 is "no", your verdict is for the defendant, and you should put an "X" here, and you need not answer any further questions.

4. If the answer to either Question 1 or 2 is "yes", what is the total dollar amount of damages to plaintiff? \$ 8140

5. In the event you have found above that the plaintiff is entitled to recover, do you find that the defendant has established its claim that plaintiff was himself negligent and that his negligence was a proximate cause of the accident? (Answer yes or no)

YES

6. If the answer to Question 5 is "yes", what percentage did plaintiff's fault so contribute? 7.5%
(If the answer to Question 5 is "no", do not answer this question.) If you entered a percentage on this question, fill in its equivalent dollar amount here. \$ 6105

7. Subtract the dollar amount stated in Question 6 from the total amount of damages stated in Question 4 and enter here the difference, which will be the net amount of damages you find the plaintiff is entitled to recover:

Question 4 total	\$ <u>8140.00</u>
- Question 6 total	\$ <u>6105.00</u>
Net Recovery	\$ <u>2035.00</u>

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MIDE O'HARA,

Plaintiff,

Plaintiff Demands a
Trial by Jury

-against-

SEAMAN'S CASE

KODER-MCCORMACK LINES, INC.,

Defendant.

Under Jones Act for
Personal Injuries

ACTION UNDER SPECIAL ACT OF CONGRESS
ENABLING SEAMEN TO SUE WITHOUT PRE-
PAYMENT OF COSTS OR THE GIVING OF
SECURITY THEREFOR

Plaintiff, by his attorneys KLEIN & STERLING,
for his complaint, respectfully alleges:

FOR A FIRST COUNT

1. At all the times hereinafter mentioned, the defendant was and is a ~~domestic~~ corporation, with offices for the transaction of business in the City, County and State of New York, and within the jurisdiction of this Court.

2. At all the times hereinafter mentioned, the defendant owned the ~~SS~~ BRASIL.

3. At all the times hereinafter mentioned, the defendant operated the ~~SS~~ BRASIL.

4. At all the times hereinafter mentioned, the defendant managed the ~~SS~~ BRASIL.

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5. At all the times hereinafter mentioned, the defendant controlled the **SS BRASIL**.

6. At all the times hereinafter mentioned, the defendant equipped and manned the **SS BRASIL**.

7. On or about the **19th day of May, 1969** the plaintiff was employed as a member of the crew of the **SS BRASIL** in the capacity of **wine steward** and except as otherwise indicated, was a member of the said crew at all the times hereinafter mentioned, and was engaged in the furtherance of his duties and of the interests of the defendant.

8. It was the obligation and duty of the defendant to furnish plaintiff with an adequate number of officers and co-employees, Master and other officers; to furnish plaintiff with a safe place in which to do his work; to supply him with suitable and safe means, materials, and appliances in and for the performance of his work; to maintain the same in proper condition for the proper performance of the said work, to promulgate and enforce proper rules in relation to the foregoing, and to inspect the aforesaid materials, appliances and means; to provide plaintiff with a safe and seaworthy vessel; and to warn plaintiff of the dangers to be encountered in the performance of his work.

9. On or about the **19th day of May, 1969**, while plaintiff was acting within the scope of his employment and in the interests of the defendant herein, he was caused to become seriously injured, as hereinafter more fully described, all by reason of the carelessness and negligence of the defendant, its officers, agents, servants, employees and other persons for whom the defendant was responsible, and in violation of the aforesaid

duties and obligation, without any fault or negligence upon the part of the plaintiff herein.

10. That on or about May 19, 1969, while plaintiff was actually engaged in the course of his duties aboard the aforesaid vessel, he was caused to be thrown down from the ship's escalator which was defective and inadequate and also because of defendant's failure to furnish him with adequate and sufficient aid and assistance; and as a result thereby plaintiff sustained injuries to his head, back and right knee; and

plaintiff was otherwise injured at or about his body and person with attendant injury to his nerves and nervous system; plaintiff has suffered and will suffer great pain, agony and mental anguish; has paid out and will pay out large sums of money for medical and surgical attention and medicines; has lost and will lose large sums of money which he otherwise would have earned as wages and in the form of board and lodging; that he has been forced to defray the cost of his maintenance and cure; and that plaintiff verily believes he has been permanently injured, all to his damage in the sum of **TWO HUNDRED THOUSAND DOLLARS (\$200,000).**

11. Plaintiff brings this action pursuant to Section 33 of the Merchant Marine Act of 1920, commonly known as the "Jones Act," and all statutes amendatory thereof and supplementary thereto.

FOR A SECOND COUNT

12. Plaintiff, realleges each and every allegation contained in paragraphs "1" to "11," inclusive, as fully and completely as though herein repledged at length.

13. That it was the absolute and non-delegable duty of the defendant to furnish plaintiff with a safe and seaworthy vessel, which duty the defendant failed to carry out, thereby causing the plaintiff to sustain the injuries hereinbefore described, to his damage in the sum of **TWO HUNDRED THOUSAND DOLLARS (\$200,000)**.

WHEREFORE, plaintiff demands judgment on the first count in the sum of **TWO HUNDRED THOUSAND DOLLARS (\$200,000)**; and on the second count in the sum of **TWO HUNDRED THOUSAND DOLLARS (\$200,000)**; together with interest, costs, and disbursements of this action.

KLEIN & STERLING
Attorneys for Plaintiff

By Benjamin B. Sterling
A Member of the Firm
Office and P. O. Address
15 Park Row
New York, New York 10038
227-3787

ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

MIKE O'HARA,

:

Plaintiff.

:

-against-

:

70 Civ. No. 4011

MOORE-McCORMACK LINES, INC.,

:

ANSWER

Defendant.

:

-----x

Defendant, MOORE-McCORMACK LINES, INCORPORATED,
sued herein as MOORE-McCORMACK LINES, INC., answering the
complaint by its attorneys, BROWNE, HYDE & DICKERSON, alleges
upon information and belief as follows:

AS TO THE FIRST CAUSE OF ACTION

FIRST DEFENSE

1. Denies each and every allegation contained
in paragraphs "SEVEN", "EIGHT", "NINE" and "TEN" except
that it admits that on or about May 19, 1969 the plaintiff
was employed as a wine steward aboard the SS BRASIL.

SECOND DEFENSE

2. If plaintiff sustained any injuries as alleged
in the complaint, which is expressly denied, said injuries
were caused in whole or in part by plaintiff's own negligence

and were not caused or contributed to in any manner by the negligence of this defendant.

AS TO THE SECOND CAUSE OF ACTION

FIRST DEFENSE

3. Repeats and realleges each and every allegation set forth above as though fully set forth herein and denies each and every allegation contained in paragraph "THIRTEEN" of the complaint and leaves all questions of law therein for the Court to determine.

SECOND DEFENSE

4. If plaintiff sustained any injuries as alleged in the complaint, which is expressly denied, said injuries were caused in whole or in part by plaintiff's own negligence and were not caused or contributed to in any manner by the negligence of this defendant.

WHEREFORE, defendant demands judgment dismissing the complaint herein together with the costs and disbursements of this action.

Dated: New York, N. Y.
January 12, 1971

BROWNE, HYDE & DICKERSON
Attorneys for Defendant

By: _____
A Member of the Firm
61 Broadway
New York, N. Y. 10006

TO: KLEIN & STERLING, ESQS.
Attorneys for Plaintiff
15 Park Row
New York, N. Y. 10038

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A-12
EXCERPTS FROM TRANSCRIPT OF TESTIMONY

36

1 MP 2 Gaston F. Guyon, Bell Steward, for plaintiff,
direct

2 G A S T O N F . G U Y O N , called as a witness by
3 the plaintiff, being first duly sworn, testified as
4 follows:

5 DIRECT EXAMINATION

6 BY MR. SCHWARTZ:

7 Q Mr. Guyon, on May 21, 1969, by whom were you em-
8 ployed?

9 A By Moore-McCormack Lines.

10 Q And were you employed on a particular ship?

11 A Yes: on the S/S Brasil.

12 Q Now, before May 21, 1969, how long had you worked
13 on that ship?

14 A I had been on the ship for a period of a month and
15 a half.

16 Q What was your position on the ship?

17 A I was bell steward.

18 Q On May 21, 1969, did you witness an occurrence?

19 A Yes; I did.

20 Q What did you see?

21 A I saw Mr. O'Hara fall right off the escalator
22 leading from the kitchen up to the main deck, to the dining
23 room deck.

24 Q And is that kitchen referred to as a galley, some-
25 times?

1 M. 3 Guyon - direct

2 A Yes. The below level is the main galley, is the
3 kitchen, and there's two escalators, one going up and the
4 other one running down, similar to those that you see in
5 those big department stores, and --

6 Q All right. Just --

7 A I am sorry.

8 Q Which escalator was he on when you saw him: the one
9 going up or the one going down?

10 A Going up. He was about to go up, as a matter of
11 fact.

12 Q And where were you at that time?

13 A I was standing on the platform at the beginning of
14 the, you know, as you -- the platform on the dining room deck.

15 Q Well, was that anywhere near the escalators?

16 A Right in front of it.

17 Q All right. Had you intended to use at that time
18 any of the escalators?

19 A Yes. I was about to proceed down the escalator.

20 Q All right. Now, as you were at that point, did you
21 see Mr. O'Hara on the escalator going up?

22 A Yes. He was just boarding the escalator.

23 Q Well, my question is --

24 A In other words, he -- one of his -- he had already
25 made a motion. He was already on the escalator.

1 MP 4 Guyon - direct

2 Q That's what I wanted to ask. Was he on the
3 escalator?

4 A Yes; he was.

5 Q All right. Now, after he was on the escalator,
6 what if anything did you either see or hear or notice?

7 A Well, what I heard was like a metal -- like, you
8 know, a hard noise of metal scratching one another and like
9 a sound, cable sound, like, you know, and I saw the escalator
10 jerk.

11 Q And what else, if anything, did you see?

12 A Well, at this moment, Mr. O'Hara was projected
13 backward, and he fell down with a rack of glasses that he
14 was holding in his hands.

15 Q What if anything did you do after you saw that?

16 A Well, I immediately rushed down and tried to give
17 assistance, and as I reached Mr. O'Hara, he was laid on his
18 back.

19 Q Was he conscious or unconscious?

20 A No; he was unconscious.

21 Q And did you do anything after that?

22 A Well, I leaned down to try to help him up, and
23 then I had a second thought, you know. I was confused, seeing
24 him like this, so I decided not to touch him, because as a
25 rule when people get hurt on board ship it is not good to try

* * *

1 MP 7

Guyon - direct

2 A I was about to go down, so that would be the es-
3 calator going up, the one that Mr. O'Hara was on.

4 Q And had you noticed that elevator jerking at that
5 time, whether it was that day or any other day, before that
6 hour or hour and a half that the accident happened?

7 A I believe it was during the same voyage, two days
8 before, that I myself had been on this same escalator and was
9 shaken by the jerk, and had I carried anything in my hands I
10 would have been in trouble.

11 Q Now, I think you said you were on this ship about
12 a month and a half before this accident, approximately?

13 A Yes.

14 Q Oh, about how many times would you say all together
15 you may have seen this jerking of the elevator?

16 A During my last period on the vessel -- we are
17 talking about May of 1960 -- I would say about a good four
18 times, myself, and being at the bell station, we had several
19 complaints coming in, because this is where all the complaints
20 are being phoned in to the bell station, mostly.

21 Q Now, still talking about this same voyage, about
22 when would you say was the first time you observed the jerk-
23 ing of this elevator on this voyage?

24 THE COURT: Escalator.

25 MR. SCHWARTZ: Escalator. I am sorry.

1 AP 9 Guyon - direct

2 months.

3 A Possibly the end of April, beginning of May. As
4 I say, they were very, very fast trips. We were out eight
5 days and came in and sailed the next morning and what-not.
6 It was very fast and a lot of confusion.

7 Q Now, did you yourself complain to anybody about
8 this condition?

9 A Yes.

10 Q To whom?

11 A Well, I reported this at the bell station, and in
12 several occasions I myself brought what I call repair slips
13 to the electricians about the escalator jerking and being
14 unsafe.

15 Q Would you have an approximation of when was the
16 first time you so reported and when would be the last time
17 since you have been on that ship?

18 A Well, I personally, the day before Mr. O'Hara's
19 accident, on my way back to the electrician's quarters to
20 report such a repair, complaints about the escalator.

21 Q That would be a day before?

22 A The day before. That's the only -- And I met one
23 of the assistant electricians in the same passageway. We
24 are talking about the same passageway which the dining room
25 is on. And I was on my way aft, and I met the electrician

A-17

MP 10 Guyon - direct

there carrying a wooden box with some light bulbs in there, and he was in the process of changing light bulbs around the vessel, and I told him that I nearly fell down on the escalator, and if he would please go over and check it. So he told me, he says, "Look: that's not my job. I have nothing to do with it."

So I says, "Well, I thought you were the electrician. I have a repair slip made out."

He says, "Look: there's only one here that can monkey with the escalator. That's the chief electrician." He says, "I don't want to hear anything about the escalator. It's too much of a headache, please." He says, "Go and see the chief."

I says, "Where's the chief?" He says, "I don't know. He works on the vessel somewhere."

So I said, "If I leave the repair slip in the usual place, the box there, will it be taken care of? It's quite bad."

So he says, "Look: you do what you want. I got my job. You got yours." And that was the end of it.

Q About how long before the accident was this, roughly?

A That was the afternoon before.

Q But you had made other complaints outside of that?

A Yes. Every time I got on the escalator and it jerked,

1 MP 11 Guyon - direct

2 I made a slip, a repair slip, and in turn brought the same
3 sheet back to the electrician repair box, which is 'way at the
4 other end of the vessel than the same passageway.

5 Q And that was before this conversation that you had
6 with the electrician, or whatever he was?

7 A Correct. They were very short voyages, as I said,
8 Mr. Schwartz.

9 Q Now, what kind of worker was Mr. O'Hara?

10 A He was a very, very efficient, and in his field
11 he was very, very good.

12 Q Now, while you were on this ship for about a month
13 and a half to two months, Mr. O'Hara had been working on this
14 ship?

15 A Yes; he had been on the vessel.

16 Q Now, during that time, did Mr. O'Hara ever complain
17 about his back or head?

18 A No. Not --

19 MR. REILLY: To him?

20 Q To you or anybody else?

21 A No.

22 MR. REILLY: Objection.

23 THE COURT: Well, he said no, he didn't.

24 THE WITNESS: No, sir. No, your Honor.

25 THE COURT: We will let it stand.

2 Q Did you observe any difficulty or anything unusual
3 in the way Mr. O'Hara worked while he was on there, on this
4 ship, working, as far as bending, or his back or anything was
5 concerned?

6 A No. I never observed Mr. O'Hara doing anything
7 noticeable of that sort, no.

8 Q Now, did you have occasion to see Mr. O'Hara after
9 this accident?

10 A Yes.

11 Q During the time that you saw him after the accident,
12 what if anything did you observe about him, about his back?

13 A I met him, I believe, two times, where we exchanged
14 words, where we spoke, and on the first occasion -- it might
15 have been the summer of 1970, and we started a conversation.
16 I don't recall what we were talking about exactly, and I find
17 him a different person. I mean, back in 1970 already he was
18 not his usual self. He seemed -- I don't know -- depressed,
19 you know, and he walked kind of slow. It's not the same per-
20 son that I worked with on the S/S Brasil, when I remember
21 where he used to show some of the people how to handle pass-
22 engers and serve wine and which wine will go with which food,
23 you know, the various kinds of food. He was a different feli-
24 altogether.

25 And the last time I saw him, then, was around

2 October of this year, and we started a conversation, and I
3 was telling Mr. O'Hara that I brought my family to Port-au-
4 Prince, Haiti, for vacation, my wife and young baby, and we
5 were talking about the island and everything, and all of a
6 sudden he started to talk about how New York was unsafe and
7 how he was sometimes doubtful to go out in the evening and
8 so on, which has nothing to do with what we were talking about.
9 I was talking about Haiti with him.

10 And all of a sudden, he stopped talking for about
11 a -- you know, for a little moment or so, and like if he was
12 searching for words, and then when he started the conversa-
13 tion again he was talking about an entirely different sub-
14 ject.

15 So I says, "Are you all right?" "Oh," he says,
16 "I'm fine," he says, and everything.

17 I says -- Well, I didn't want to tell him what my
18 thoughts were, but I could see that he was getting --

19 Q Let me ask you this:

20 Did you ever notice this before when in talking to
21 him he stopped talking, you say, for about a minute or half a
22 minute or something like that? Is that what you said?

23 A Yes; for a long moment.

24 Q And then went on to something?

25 A And then went on to an entirely different subject,

1 MP 16 Guyon - cross

2 We spoke on the telephone.

3 Q Did you see him in 1972?

4 A No; we didn't.

5 MR. REILLY: Thank you.

6 MR. SCHWARTZ: That's all.

7 THE COURT: You are excused, Mr. Guyon. Thank you
8 very much.

9 THE WITNESS: Thank you, your Honor.

10 (Witness excused.)

11 THE COURT: I believe the witness next is Mr.
12 Scott.

13 R A N D O L P H B E R N A R D S C O T T , called as
14 a witness by the plaintiff, being first duly sworn,
15 testified as follows:

16 DIRECT EXAMINATION

17 BY MR. SCHWARTZ:

18 Q Mr. Scott, on May 21, 1969, by whom were you
19 employed?

20 A Moore-McCormack Steamship Company.

21 Q And on that day, where were you working?

22 A In the galley, called the kitchen. The galley.

23 Q On what particular ship were you working?

24 A On the Brasil.

25 Q And how long had you been working on this ship

1 MP 17 Scott - direct

2 before May 21, 1969?

3 A A little over two years.

4 Q On May 21, 1969, what was your position?

5 A Chief utility.

6 Q On that day, did you see Mr. O'Hara?

7 A Yes; I did.

8 Q And that day, did you notice something happened
9 to him while you were on the ship where you were working?

10 A Yes.

11 Q First, about what time was this?

12 A Approximately eleven-something. After eleven.

13 THE COURT: What was that: in the morning?

14 THE WITNESS: Yes, Judge.

15 THE COURT: Thank you.

16 Q And what did you notice, hear, see and do? At
17 that time, what did you notice about Mr. O'Hara and what did
18 you do?

19 A At that time, I heard a noise, and when I looked
20 back where I was standing, I saw Mr. O'Hara midway on the
21 escalator, and all the glasses crumbled between the escalator
22 and the retort wheels that they had. So I run up the
23 escalator and cut the escalator off.

24 Q When you say you cut the escalator off, you cut off
25 the power so it doesn't move?

1 MP 18

Scott - direct

2 A I cut the switch off with a key, so it stopped in-
3 stantly.

4 Q Now, when you saw Mr. O'Hara, was he conscious or
5 unconscious?

6 A He was lying on his back at the foot of the escal-
7 ator.

8 Q Did you notice whether he was conscious or uncon-
9 scious?

10 A He wasn't saying anything.

11 Q Did he move?

12 A No.

13 Q After you cut off the power of that escalator, what
14 did you do?

15 A I run back down, the opposite one, run down.

16 Q Yes?

17 A And I pulled him away from the flat way he was
18 lying on his back.

19 Q After you pulled him away, did anybody else come
20 over?

21 A Yes.

22 Q Who?

23 A I have another one of the workers helped me move
24 him and put him on the side of a table, a steel table, a
25 dresser.

A-24

1 MP 19 Scott - direct

2 Q Did any --

3 MR. SCHWARTZ: I withdraw that.

4 A Then there was --

5 Q Then where was he taken, after that?

6 A The Second called the doctor, and he came with a
7 wheel chair in the galley and took him down to the hospital.

8 Q Was he put in the wheel chair?

9 A Yes.

10 Q Now, directing your attention to a period of time
11 before the accident of May 21, 1969, at any time, whether
12 that day or before that day, had you ever noticed anything
13 about this escalator?

14 A Yes.

15 Q What?

16 A It had many, many instances concerning the escala-
17 tor. It bumps, and the waitresses tumbled on the escalator.
18 Some fell, some trays fell, and it's always out of order, I
19 should say.

20 Q Now, is that the up escalator?

21 A The --

22 Q The one going up from the galley to the dining room?

23 A The one going up from the galley to the dining
24 room, and on the other side, one comes down.

25 Q And the escalator that we are talking about --

A-25

1 MP 20 Scott - direct

2 A -- is the one going up.

3 Q -- which was jerking with the girls falling, is
4 the one going up?

5 A Yes.

6 Q Now, about when would you say was the last time
7 before this occurrence that you noticed this escalator
8 shaking or jerking or whatever words you were using?

9 A A couple of weeks before the incident with O'Hara.

10 Q And about when would you say was the first time
11 you noticed it?

12 A A few months prior to that time.

13 Q Did you ever complain to anybody about the escala-
14 tor?

15 A Yes.

16 Q Whom did you complain to about it?

17 A As a matter of fact, they complained to me, because
18 I am in charge of that area, and in turn I complained to the
19 electrician.

20 Q What electrician was that?

21 A The chief electrician.

22 Q And when would you say would be the --

23 MR. SCHWARTZ: I withdraw that.

24 Q How many times would you say you complained about
25 that?

8

1 MP O'Hara - direct

98

2 A Before noon.

3 Q On what part of the ship did it happen?

4 A On the escalator.

5 Q What were you doing at the time?

6 A I was carrying glasses to the dining room, from the
7 galley to the dining room.

8 Q How were you carrying the glasses?

9 A On a rack.

10 Q Will you tell the Court and jury what if anything
11 occurred while you were on the escalator?

12 A The escalator was jerking.

13 Q What happened?

14 A I lost my balance, and I fell. I think -- I was
15 ejected from the escalator.

16 Q Did you fall backwards?

17 A Backwards; yes, sir.

18 Q What happened to you after you fell?

19 A I was knocked unconscious, so --

20 Q Now, what is the first thing you knew when you
21 regained consciousness?

22 A They carried me on the wheel chair to the ship
23 hospital.

24 Q Was a doctor there at that time?

25 A There was a lot of people. There was a nurse,

1 MP O'Hara - direct 99

2 doctors and --

3 Q Now, as far as this escalator was concerned, about
4 when was the last time before this accident, if ever, that
5 this escalator jerked, as far as you know?

6 A We had a lot of trouble with it.

7 Q As far as you know --

8 MR. REILLY: I move to strike the answer.

9 THE COURT: Strike it. Erase the answer from
10 your minds, ladies and gentlemen of the jury. The reason
11 I tell you that is that it does not respond to the pending
12 question.

13 MR. SCHWARTZ: I will withdraw the question and put
14 it this way:

15 Q First, before your accident, did you ever see this
16 elevator jerk before?

17 A Yes, sir.

18 Q All right. About when would you say was the first
19 time before the accident that you --

20 A A couple of days before that.

21 Q Was that the first time or the last time?

22 A The last time I saw it.

23 Q About when was the first time, approximately?

24 A When I started on the ship, in October.

25 Q Did you ever complain to anybody about the jerking

|

1 MP O'Hara - direct 100

2 of the --

3 A Yes.

4 Q To whom?

5 A To the head waiter and the dining room manager.

6 Q Now, coming back to the time of the occurrence,

7 when you came to, I think you said you were in a wheel chair,
8 being put in a wheel chair; is that correct?

9 A Yes, sir.

10 Q Where were you taken?

11 A To the ship's hospital.

12 Q What if any part of your body was hurt?

13 A My head, my back and my knee.

14 Q When you were taken to the ship's hospital, what
15 was done for you?

16 A They gave me medicine.

17 Q About how long were you there?

18 A Until the night, the same day. They asked me if I
19 wanted to go to my quarters, so they sent me at night to my
20 quarters.

21 Q And the next day, did you receive any further treat-
22 ment?

23 A Yes. I had to report to the doctor every day.

24 Q Now, after the ship docked, did you go to any hos-
25 pital?

1 mp:mg 90

Miller-direct

2 Q Would you tell the Court and jury briefly about
3 your maritime background, licenses and experience?

4 A Well, I was with the Moore-McCormack Lines from
5 1947 until 1969.

6 I sailed as chief electrician on the old ships
7 and they assigned me to new construction when they built
8 the S. S. Brasil.

9 I went to Pascagoula in 1957, April, and boarded
10 the ship in 1958 when she was commissioned and I remained
11 there as electrical engineer until she laid up.

12 Q And what did your duties of electrical engineer
13 consist of?

14 A Supervision of all the electrical equipment,
15 repair and maintenance of that equipment on board the
16 vessel.

17 Q Including the ship's escalators?

18 A Escalators, elevators and everything involved.

19 Q How many escalators did the Brazil have?

20 A Two.

21 MR. REILLY: Would you mark these photographs
22 for identification, please.

23 xx (Defendant's Exhibits J-1 and J-2 marked for
24 identification.)

25 MR. REILLY: These are photographs, your Honor.

1 mp:mg 100

Miller-direct

2 and he was not.

3 THE COURT: You were one of the ship's officers?

4 THE WITNESS: That is correct.

5 THE COURT: And he was like a petty officer?

6 THE WITNESS: That's right.

7 THE COURT: And he was under you?

8 THE WITNESS: That is correct.

9 Q Would you tell the Court and jury what complaints,
10 if any, you received with regard to jerking movements of
11 the steps of the escalator?

12 MR. SCHWARTZ: May I inquire whether this ques-
13 tion pertains to those delivered to him personally or
14 includes the complaint box that he is talking about?

15 THE COURT: I think anything he knows about it
16 would be pertinent.

17 MR. SCHWARTZ: Well, the way the question was,
18 it wasn't clear.

19 THE COURT: Well, let's make sure it is clear.
20 I would like that covered, anything he knows about in the
21 way of complaints.

22 Q Would you tell us anything you might know about
23 complaints directed to these escalators, with regard to the
24 jerking of the steps?

25 A To my knowledge, I know of no complaints the

1 mp:mq 102

Miller-cross

2 A In charge of all equipment aboard the S. S. Brasil.

3 Q Just what did you do?

4 A Necessary maintenance and repair.

5 Q Did you go out and do repairs yourself or was
6 there somebody under you?

7 A No. There was somebody under me.

8 Q Who was under you?

9 A The chief electrician.

10 Q How many?

11 A Chief electrician, first electrician and second
12 electrician.

13 Q Now, this complaint box that was in existence,
14 there was such a box, is that right?

15 A Yes, there was.

16 Q Where was it kept?

17 A In the electrical shop.

18 Q When the complaints were put into that box, who
19 took them out?

20 A The chief electrician or myself.

21 Q How often would you take them out?

22 A Whenever they came in.

23 Q You mean, if I put one in there at one o'clock
24 you would take it out at five after one?

25 A In all likelihood, yes.

1 mp:mg 104 Miller-cross

2 depending on the number of slips.

3 Q You say that you don't know of any defects in
4 this-- or defects or complaints concerning defects in
5 this elevator jerking or moving? You say none of that
6 took place?

7 A That's exactly right.

8 Q Let me see if I understand it.

9 You say that none of this was called to your
10 attention or none of this took place?

11 A It was never called to my attention.

12 Q Would you say none of this took place?

13 A I have no way of knowing.

14 Q Tell me: If somebody is hurt on that escalator,
15 would that come to your attention?

16 A It would if it would ever happen.

17 Q It would?

18 A Yes.

19 Q Did Mr. O'Hara's accident come to your atten-
20 tion?

21 A It did not.

22 Q Other people were injured on that escalator,
23 weren't they?

24 A Not on the escalator.

25 Q I am talking about the escalator --

2 A I am talking about the escalator. No one was
3 injured on that escalator.

4 THE COURT: As far as you know?

5 THE WITNESS: As far as I know, yes, sir.

6 Q Now, was that escalator ever repaired?

7 A Routinely, yes. Routine maintenance.

8 Q What do you mean by that?

9 A Excuse me, what kind of repair?

10 THE COURT: He asked you, was it ever repaired.

11 THE WITNESS: All the equipment on the ship
12 was repaired and so the escalators were, of course.

13 Q I asked you a question and you said routinely.
14 I asked you what you mean by routine.

15 A Well, routinely repaired the escalators, worn
16 parts would be replaced, anything else like that.

17 Q Are you telling me now that you look at that
18 escalator and repair parts when there is nothing wrong?

19 A Well, certainly. We repair it before it goes
20 wrong.

21 Q And how often would you do that?

22 A Whenever we had time. Usually when we were in
23 port in New York, because Otis Elevator had a service
24 contract and they were on board every trip to check the
25 equipment.

1 mp:mg 108

Miller-cross

2 Q And if the main drive motor is defective in any
3 way, that main drive would in turn affect the operation
4 of the escalator, wouldn't it?

5 A Only to stop.

6 Q What about going?

7 A Well, either it goes or it doesn't go.

8 Q Well, it can go and stop, can't it?

9 A No, it can't.

10 Q In other words, it only has to do with stopping?

11 A When it stops, someone has to intentionally
12 restart it.

13 Q That is the part that you took care of?

14 A What?

15 Q What we were just talking about.

16 A The starting?

17 Q You just said you took care of that switch.

18 THE COURT: The phase reversal switch.

19 THE WITNESS: That's part of it. I supervised
20 it. I didn't take care of it personally.

21 Q And what else did you do in the way of repairs
22 on that escalator?

23 A That's a very broad scope. It is hard to re-
24 member what we did. They were all very minor things.

25 THE COURT: Did you keep a repair log or record?

1 mp:mg 109

Miller - cross

2 THE WITNESS: On board the vessel; yes, sir.

3 THE COURT: Who made the entries in that repair
4 log or record?

5 THE WITNESS: I did.

6 Q Do you have it?

7 A No, I haven't.

8 Q What did you do with it?

9 A I have no idea. It was left aboard the vessel.

10 Q When was it left aboard the vessel?

11 A In 1969, when they laid the vessel up.

12 Q Would you say that the functioning of the es-
13 calators was your responsibility?

14 A Right, yes.

15 Q Could those escalators stop while in motion?

16 A Certainly they can stop; with any power inter-
17 ruption, they would stop.18 Q In regard to J-2 for identification -- oh, it
19 is in evidence-- J-2 in evidence, who had the key to that?20 A I had a key. The chief electrician had a key.
21 and the dining room matron had a key.

22 MR. SCHWARTZ: That's all of this witness.

23 MR. REILLY: Nothing further.

24 Thank you, Mr. Miller.

25 (Witness excused.)

1 mp:mg 113

Steel-direct

2 particularly with this complaint of stopping and starting?

3 MR. SCHWARTZ: I object to the form of that.

4 THE COURT: Well, the form I think is objection-
5 able.

6 Perhaps you could break it down into shorter
7 questions rather than just asking for these general com-
8 ments.

9 Q Assume if you will, Mr. Steel, that this es-
10 calator came to a stop, what, if anything, would then
11 have to be done to get it moving again?

12 A The escalator is started by means of a key
13 switch. The switch is present at each landing of the
14 escalator on the balustrade. This is our standard
15 installation.

16 I don't know as far as this particular instal-
17 lation. On occasion there are special features in a
18 contract that have a switch placed at a remote area.
19 However, the only way you can start the escalator is with
20 a key inserted in the switch.

21 Q Well, if it were to stop for two seconds could
22 it start again without this turning of the switch?

23 A No, sir.

24 Q Why not?

25 A Well, stopping the escalator, the motor is

1 MP Esposito - direct

453

2 A Yes; I do.

3 Q Did you see Mr. O'Hara on July 10th of 1971?

4 A Yes; we did, at 12:40 p.m.

5 Q And where did you see Mr. O'Hara?

6 A He came out of his house and went to the super-
7 market.

8 Q And then?

9 A He came out of the store, carrying a medium-sized
10 bag, and proceed to a stationery store across the street and
11 purchased a newspaper and then returned home.

12 Q And would you describe Mr. O'Hara's walk as you saw
13 him on July 10th of 1971?

14 A He walked in a normal manner, with no apparent
15 physical difficulty.

16 Q Did you go to Mr. O'Hara's residence again in July
17 of 1971?

18 A Yes, sir.

19 MR. SCHWARTZ: I object to counsel leading the wit-
20 ness.

21 THE COURT: Yes. Please don't lead after this.

22 Q Yes, sir --

23 A On July 26, 1971. Mr. O'Hara wasn't seen on this
24 date.

25 Q When did you next go?

1 MP Esposito - direct

455

2 346 West 17th Street.

3 Q And how did he go there?

4 A By train.

5 Q Did you observe him as he walked along that day?

6 A Yes; I did.

7 Q And as he climbed the stairs of the subway?

8 A Yes; I did.

9 Q And will you tell us -- would you describe his walk
10 for us that day?

11 A He walked in a normal manner, with no apparent
12 physical difficulty.

13 Q When did you last see him on that day?

14 A At ten-thirty a.m.

15 Q Where was he then?

16 A In the building of the National Maritime Union.

17 Q When did you next go to Mr. O'Hara's residency?

18 A On October 27, 1971.

19 Q Was he seen on that day?

20 A No; he was not.

21 Q When did you next go to Mr. O'Hara's residence?

22 A On November 5, 1971.

23 Q Was he seen on that day?

24 A Yes; he was.

25 Q And where was he seen ^{on} that day?

1 MP

Esposito - direct

453

2 THE COURT: And someone else continued on?

3 THE WITNESS: That's right.

4 THE COURT: And you didn't see him after you dropped
5 out?

6 THE WITNESS: Yes; I did. I followed in a car.

7 THE COURT: You followed in an automobile and kept
8 him under constant observation?9 THE WITNESS: Not every second. He was blocked some-
10 times by trucks and cars, but most of the time he was in my
11 sight until the hall -- until the union hall.

12 Q When did you next go to Mr. O'Hara's apartment?

13 A August 10, 1973.

14 Q Was he seen on that date?

15 A No; he was not.

16 Q When did you next go?

17 A September 27, 1973.

18 Q Was he seen on that date?

19 A Yes; he was.

20 Q Would you describe his walk on that date?

21 A He was using a cane and walked with a noticeable
22 limp.

23 Q When did you next see Mr. O'Hara?

24 A On October 18, 1973.

25 Q And would you describe his walk on that day?

1 COURT CHARGE
2 MP

A-40

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2 MIKE O'HARA

3 VS

4 MOORE-McCORMACK LINES, Inc.

70 Civil 4011

5

6

New York, N. Y.

7

January 8, 1974 - 1:45 p.m.

8

CHARGE OF THE COURT

9

10 THE COURT: (Ward, D. J.) Madam Forelady, ladies
and gentlemen:

11

12 It is the custom in our court for the juror seated
13 in Seat Number 1 to be your foreman or, in this case, your
14 forelady, and Mrs. Lerner will serve in that capacity. The
15 function of the foreman or forelady is to sit at the head
16 or first place at the table and take the vote of the jurors
17 as it is being given and also, should the jury have something
18 they wish to ask the Court, that is, if you wish to have
19 any portion of the testimony read to you or if you wish to have
20 any portion of the exhibits or if you wish to have any portion of
21 my charge read back to you, your forelady will write a note
22 to the Court. I will receive the note while you are still in
23 your jury room; I will open it; I will read its contents to
24 counsel, and to the extent we can comply with your question
25 or request we shall do so as promptly as possible.

Members of the jury, we come now to that portion of

2 the trial where you are instructed in the law applicable to
3 the case. You will then retire for your final deliberations.

4 You have now heard all the evidence introduced by
5 both sides and through arguments of their respective attorneys.
6 you have learned the conclusions which each party believes
7 should be drawn from the evidence presented to you.

8 A lawsuit is a civilized method of determining
9 differences between people. It is basic to the administration
10 of any system of justice that the determination on both the
11 law and the facts be made fairly and honestly.

12 You as the jurors and I as the Judge have a heavy
13 responsibility to assure that a just result is reached in
14 the determination of the differences between the plaintiff and
15 the defendant in this case.

16 As the jurors, your fundamental duty is to determine
17 from all the evidence that you have heard and the exhibits
18 which have been admitted into evidence what the facts are.
19 You are the sole and exclusive judges of the facts. In that
20 field you are supreme, and neither I nor anyone else may
21 invade your province.

22 On the other hand, and with equal emphasis, I charge
23 you that you are bound to accept the law in the case as it
24 is given to you in this charge and in any instructions that
25 I have given to you during the course of the trial. Whether

2 you agree with the law as given to you by the Court or not,
3 you are still bound by it.

4 The process by which you arrive at a verdict is
5 first to determine from all of the evidence and the exhibits
6 what the facts are and second, to apply the law of the case,
7 as I give it to you, to the facts as you have determined them
8 to be. The conclusion thus reached will be your verdict.
9

10 I have endeavored to preside impartially and not to
11 express an opinion one way or the other as to what you should
12 find the facts to be. In the course of the trial it has been
13 necessary for me to rule on the admission of evidence and on
14 motions made with respect to the applicable law. You must not
15 infer from any such ruling which I have made or from anything
16 that I have said during the course of the trial that I hold
17 any views for or against either of the parties to the law
18 suit or for or against any of the attorneys in the case.
19 My views of mine would, in any event, be totally irrelevant,
20 since it is your recollection of the evidence and your
21 determination of the issues of fact which controls.
22

23 At times during the trial I have sustained objec-
24 tions to questions which were asked, without permitting the
25 witness to answer or, on occasion, when an answer was given,
I instructed that it be stricken from the record and that you
disregard it and erase it from your mind. You may now draw

1 MP

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2 any inference from an unanswered question nor may you con-
3 sider testimony which has been stricken in reaching your de-
4 cision.

5 The law requires that your decision be made solely
6 upon the competent evidence before you. Such items as I
7 have excluded from your consideration were excluded because
8 they were not legally admissible. The law does not, however,
9 require you to accept all of the evidence I have admitted,
10 even though it be competent. In determining what evidence
11 you will accept you must make your own evaluation of the
12 testimony given by each of the witnesses and determine the
13 degree of weight you choose to give to that particular wit-
14 ness' testimony.

15 The testimony of a witness may fail to conform to
16 the facts as they occurred because he is intentionally telling
17 a falsehood or because he did not accurately see or hear that
18 about which he testified or because his recollection of the
19 events is faulty or because he has not expressed himself
20 clearly in giving his testimony.

21 There is no magic formula by which one may eval-
22 ate the testimony. You bring with you to this courtroom all
23 of your experience and the background of your lives. You
24 bring your common sense. You are going to take your common
25 sense with you into the jury room, and I do hope that when

1 MP

2 you return from your deliberations you will still have your
3 common sense with you at that time.

4 In your everyday affairs, you determine for your-
5 selves the reliability or unreliability of statements made
6 to you by others. The same tests that you use in your every-
7 day dealings are the tests which you apply in your delibera-
8 tions.

9 The interest or lack of interest of any witness in
10 the outcome of this case, the bias or prejudice of a witness,
11 if there be any, the appearance, the manner in which the
12 witness gave his testimony on the stand, the opportunity
13 that the witness had to observe the facts concerning which
14 he testified, the probability or improbability of the wit-
15 ness' testimony when viewed in the light of all the other
16 evidence in the case are all items to be taken into your con-
17 sideration in determining the weight if any you will assign
18 to that witness' testimony.

19 If such considerations make it appear that there
20 a discrepancy in the evidence, you will have to consider
21 whether the apparent discrepancy may not be reconciled by fit-
22 ting the two stories together. If, however, that is not
23 possible, you will then have to determine which of the con-
24 flicting versions you will accept.

25 The plaintiff testified before you as a party to

1 the action. He is an interested witness. That a witness is
2 interested in the outcome of the case does not mean that
3 he has not told the truth. It is for you to determine from
4 his demeanor on the stand and such other tests as your experi-
5 ence dictates whether or not his interest is such that he is
6 likely, unintentionally or otherwise, to color his testimony.
7 You are at liberty, if you deem it proper under all of the
8 circumstances to do so, to disbelieve the testimony of such a
9 witness, even though it is not otherwise impeached or contra-
10 dicted. However, you are not required to disbelieve such a
11 witness, and you may accept all or such part of his testimony
12 as you deem reliable and reject such part as you deem unworthy
13 of acceptance.

14 There were two types of witnesses who testified in
15 this case. There were so-called fact witnesses, and also
16 there were expert witnesses. I should like to comment brief-
17 ly relative to the latter: the expert witnesses.

18 You will recall that Drs. Koven, Freiman, Kershen-
19 baum and Balensweig gave testimony concerning their qualifi-
20 tions as experts in the field of orthopedics and neurology, in
21 the field of medicine. When a case involves a matter of
22 science or art, requiring special knowledge or skill not
23 ordinarily possessed by the average person such as ourselves,
24 an expert is permitted to state his opinion for the informa-
25 tion of the Court and the jury.

1 MP

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2 The opinion stated by each expert who testified
3 before you was based on particular facts as the expert him-
4 self observed them and testified to them before you or as the
5 attorney in questioning the expert asked him to assume. You
6 may reject an expert's opinion if you find the facts to be
7 different from those which formed the basis for the opinion.
8 You may also reject his opinion if after careful consideration
9 of all the evidence in the case, expert or other, you dis-
10 agree with the opinion. In other words, you are not required
11 to accept an expert's opinion to the exclusion of the facts
12 and circumstances disclosed by other testimony. Such an
13 opinion is subject to the same rules regarding reliability as
14 the testimony of any other witness. It is given to assist
15 you in reaching a proper conclusion and is entitled to such
16 weight as you find the expert's qualifications in his field
17 warrant and must be considered by you but is not controlling
18 upon your judgment.

19 You may accept the testimony of the experts; you may
20 give it great weight; you may give it little weight; you may
21 reject it or give it no weight.

22 You heard on at least one occasion counsel entering
23 into a stipulation. This had to do with the life expectancy
24 of the plaintiff. I will get back to that matter a little
25 later, but where all parties stipulate to a certain fact,

1 MP

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2 where all parties agree to that fact, that matter or those
3 matters are undisputed, and you should accept the stipulations
4 as accurate.

5 Additional examples are:

6 The parties stipulated that the plaintiff, on May
7 21, 1969, was employed by the defendant aboard the S/S
8 Brasil as a wine steward and that the defendant, Moore-
9 McCormack Lines, Inc. on May 21, 1969 owned and operated the
10 S/S Brasil.

11 Aside from these stipulations, which you shall accept
12 as accurate, there are other facts which are in conflict, and
13 it is for you, the jury, to determine which of these conflict-
14 ing facts you accept and which you reject. As I have said,
15 that is your sole province. You are exclusive judges of the
16 facts.

17 We have a general doctrine relative to the testimony
18 of witnesses that I have adverted to but I should like to
19 cover briefly at this time. It is the doctrine of "falsus
20 in uno, falsus in omnia", coming from the Latin. Basically,
21 it means this: If you find that any witness has wilfully
22 testified falsely as to any material fact, the law permits you
23 to disregard completely the entire testimony of that witness
24 upon the principle that one who testifies falsely about one
25 material fact is quite likely to testify falsely about every-

thing. You are not required, however, to consider such a witness as totally unworthy of belief. You may accept so much of his testimony as you deem true and disregard what you feel is false.

By the processes which I have just described to you, you as the sole judges of the facts determine which of the witnesses you will believe, what portion of their testimony you will accept and what weight you will give to it.

I would like to speak now about something called the burden of proof. The burden of proof rests here on the plaintiff, Mr. O'Hara. That means that the plaintiff must establish his claim by what is called a fair preponderance of the credible evidence. The credible evidence means the testimony or exhibits that you find to be worthy to be believed. A preponderance means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and the effect that it has on your minds.

The law requires that in order for the plaintiff to prevail the evidence that supports his claim must appeal to you as more nearly representing what took place than that opposed to his claim. If it does not or if it weighs so

2 evenly that you are unable to say that there is a preponder-
3 ance on either side, then you must resolve the question in
4 favor of the defendant. It is only if the evidence favorable
5 to the plaintiff's claim outweighs, albeit it by a little
6 bit, the evidence opposed to it that you can find in favor of
7 the plaintiff.

8 As you will recall, the plaintiff was a seaman and
9 a member of the crew of the S/S Brasil, owned by the defend-
10 ant, Moore-McCormack Lines, Inc. In this suit he asserts
11 two separate claims. The first of these is for negligence
12 under the Jones Act, and the second is for unseaworthiness
13 under the General Maritime Law.

14 These claims should be considered separately by
15 you. The plaintiff may be entitled to recover if he establishes
16 either claim.

17 You will note at this time that the verdict form
18 which you will take with you into the jury room as its first
19 two questions treats with first the matter of unseaworthiness
20 Question 1; second, the matter of negligence, in Question 2.
21 I think you will be able to follow the verdict form very
22 readily, and it will be available and will serve as a guide
23 and an outline to you as you consider the case.

24 The defendant denies that it was negligent or that
25 it violated any duty it owed Mr. O'Hara. In addition, it

2 claims that Mr. O'Hara caused or contributed to his own
3 injury.

4 Let us first consider the plaintiff's claim for neg-
5 ligence under the Jones Act.

6 In order to recover, the plaintiff must prove that
7 his employer was negligent, and the question you must first
8 ask therefore is: what is negligence? Negligence is the
9 doing of some act that a reasonably prudent person would not
10 do or the failure to do something that a reasonably prudent
11 person would do under the same or similar circumstances.

12 It is, in other words, the failure to use ordinary care under
13 the circumstances. The mere occurrence of an accident, of
14 course, does not raise any presumption of negligence.

15 The obligation of a ship owner under the Jones
16 Act for the safety of seamen is substantially greater than
17 that of an ordinary employer to his employees. The word
18 "negligence" therefore, as used in the Jones Act, which makes
19 the employer of seamen liable for his negligence, must be
20 given a liberal interpretation. It includes any breach of
21 any obligation that the employer owes to the seamen, includ-
22 ing the obligation of seeing to the safety of the crew.

23 Under the Jones Act, if the employer committed some
24 act or omission that played any part, no matter how small, in
25 actually bringing about or causing injury to Mike O'Hara,

2 then you should find that the employer was negligent.

3 Negligence under the Jones Act may consist of a
4 failure to comply with a duty required by law. The employers
5 of seamen have a legal duty to provide their employees with a
6 safe place in which to work. If you find that in this case
7 the plaintiff was injured because the defendant failed to
8 furnish him with a reasonably safe place to work and that
9 the plaintiff's working conditions could have been made safe
10 through the exercise of reasonable care, then you may find
11 that the defendant was negligent.

12 An employer is legally responsible for the negli-
13 gence of its employees while acting within the course and
14 scope of their jobs. It is not necessary to show that the man-
15 agement or officers of the employer company were themselves
16 negligent in any way for it to be responsible.

17 Plaintiff also seeks to recover damages from the
18 defendant because of the claimed unseaworthiness of the
19 defendant's vessel, the S/S Brasil. The owner of a vessel
20 has a duty to provide a vessel that is reasonably fit for its
21 intended use, and this duty extends not only to the vessel
22 itself but to all of its parts and equipment.

23 The duty to provide a seaworthy ship is absolute.
24 The owner may not delegate that duty to anyone. If he does
25 not provide a seaworthy vessel, then no amount of due care or

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2 prudence excuses him, whether or not he knew or could have
3 known of the deficiency.

4 The duty to provide a seaworthy vessel requires that
5 the vessel must be reasonably fit for its intended purpose and
6 that the vessel, its gear, appurtenances and operation must
7 be, reasonably safe. The duty to provide a seaworthy vessel
8 includes the duty to supply an adequate and competent crew.
9 Even though the vessel owner provides a numerically adequate
10 crew, the vessel may still be unseaworthy if too few men are
11 assigned to a given task.

12 If you find, therefore, that the owner of this
13 vessel did not provide an adequate crew or sufficient man-
14 power to perform the tasks required, or if you find that the
15 vessel was in any way unsafe or in any manner unfit or if
16 you find that too few men were assigned to a given task, then
17 you may find that the vessel was unseaworthy and the ship
18 owner liable, without any reference to the issue of negligence
19 of the defendant or any of its employees.

20 The owner of a vessel is not, however, required to
21 furnish an accident-free ship. Its duty is only to furnish a
22 vessel and appurtenances reasonably fit for their intended
23 use and a crew that is reasonably adequate in numbers for
24 their assigned tasks.

25 A vessel is not called on to have the best of

2 appliances and equipment or the finest of crews but only
3 such gear as is reasonably proper and suitable for its in-
4 tended use and a crew that is reasonably adequate.

5 If you find, therefore, that the defendant had a
6 capable and competent crew and appliances and gear that were
7 safe and suitable for their intended use, then the vessel
8 cannot be said to have been unseaworthy, and the defendant is
9 entitled to a verdict on this cause of action.

10 It is not a valid defense to a suit like this one
11 to contend that the injured seaman assumed the risk of his
12 employment if the injury resulted, in whole or in part, from
13 the negligence of the owner of the vessel or any of its
14 officers, agents or employees, but the employer is not liable
15 merely because a seaman has been injured. The employer is
16 liable only if it has been negligent or has failed to provide
17 a seaworthy vessel. If a seaman is injured as a result of
18 the normal hazards or risks of the business in which he is
19 engaged, without fault on the part of anyone else and despite
20 the fact that the ship and its equipment were seaworthy, he
21 is not entitled to recover damages from his employer.

22 We next consider the matter referred to in the law
23 as causation.

24 Not every injury that follows an accident necessarily
25 results from it. If I am in an automobile accident today and

2 get a cold tomorrow, that does not mean my cold is a result
3 of the automobile accident. In this respect, a different rule
4 applies to proof of causation under the Jones Act than the
5 rule applicable to a claim of unseaworthiness.

6 Under the Jones Act, an injury or damage is con-
7 sidered caused by an act or failure to act whenever it
8 appears from a preponderance of the evidence that the act or
9 omission played any part, no matter how small, in bringing
10 about or actually causing the injury or damage. However,
11 with respect to the unseaworthiness claim, it is necessary
12 for the plaintiff to show not only that the act or omission
13 played a substantial part in bringing about or actually caus-
14 ing the injury to him, but also that the injury was either
15 a direct result or a reasonably probable consequence of the
16 act or omission.

17 The defendant here contends that the plaintiff him-
18 self was negligent and that the negligence caused his injury.
19 This is a defense, and the burden of proving the plaintiff
20 was negligent is on the defendant. But the fact that the
21 plaintiff's acts may have contributed to causing his accident
22 or injury does not in this type of case prevent his recovery
23 for damages.

24 In suits like this one, you are required to find
25 whether the plaintiff, Mr. O'Hara, was guilty of contributory

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2 negligence and, if so, what percentage his contributory neg-
3 ligence contributed to the accident. But this does not pre-
4 vent his recovery. It only reduces the amount.

5 This is covered in the jury verdict form, and I
6 think if you read it you will follow what we do here.

7 We ask that if you find contributory negligence you
8 compute the percentage and then make a mathematical computa-
9 tion. It is down here for you, and you can follow it in the
10 jury room.

11 If you find that the accident was due partly to
12 the fault of the plaintiff and you find that his negligence
13 was, say, ten per cent responsible for the accident, then you
14 will fill in this information on the verdict form.

15 Obviously, by using the number ten per cent I do not
16 mean to suggest any amount. You may find zero per cent or
17 ten per cent or ninety per cent or a hundred per cent. On
18 the verdict form I will give you there will be a blank for
19 you to insert your findings in this regard. Whatever amount
20 if any, you find will not prevent the plaintiff from recover...
21 You will merely reduce the damages that you find proper by
22 the percentage that you insert.

23 As I say, I think you will find this self-explanatory
24 from the verdict form, which we have now used in this court
25 for some time.

2 So much for the matter of liability and negligence
3 and the seaworthiness issue. Let us turn now to the matter
4 of damages.

5 If you find that the defendant, Moore-McCormack
6 Lines, Inc. was not negligent and the vessel was not unsea-
7 worthy, that is the end of the case. Your verdict will be for
8 the defendant. Furthermore, if you find that the defendant
9 was negligent or that the vessel was unseaworthy or both but
10 that nevertheless any negligence of the defendant or any un-
11 seaworthiness of the vessel which you have found was not the
12 proximate cause of the accident, your verdict must be for
13 the defendant.

14 On the other hand, if you find that the defendant
15 was negligent and that such negligence was a proximate cause
16 of the accident or that the vessel was unseaworthy and that
17 such unseaworthiness was a proximate cause of the accident,
18 then you will go on to consider the question of the plaint-
19 iff's damages.

20 On the subject of damages, plaintiff claims that he
21 suffered a permanent injury to his back consisting in substance
22 of an aggravation of a previous lumbosacral strain and disc
23 condition and that he sustained a concussion, which allegedly
24 resulted in headaches, falling and traumatic epilepsy.

25 The defendant vigorously disputes the plaintiff

2 suffers from traumatic epilepsy or any permanent injury re-
3 sulting from the accident of May 21, 1969, which is the sub-
4 ject of this law suit.

5 Both sides have offered testimony and evidence on
6 that subject. Both counsel have spoken extensively on that
7 subject in their summations. I will not discuss that testi-
8 mony and evidence in detail. Here again, it is your recol-
9 lection of the evidence which controls, and it is for you to
10 say what weight you will give to it and what testimony you
11 believe.

12 If you reach this point in your deliberations, your
13 aim should be to award a sum of money which will be fair and
14 reasonable compensation to plaintiff for the injuries he re-
15 ceived as a result of the accident of May 21, 1969. You may
16 take into effect the nature and extent of his injuries,
17 whether they are temporary or permanent in character, the
18 pain and suffering that he has endured and which you believe
19 to be reasonably certain that he will be called upon to endure
20 in the future and the wages which he has lost and the wages
21 if any that you believe to be reasonably certain that he
22 will lose in the future.

23 There is no evidence that plaintiff has paid out
24 anything for hospitals, doctors or medical expenses. The
25 medical services which he received at the Maritime Hospitals

1 maintained by the United States Public Health Service are
2 free.

3 A word on life expectancy:

4 Counsel have stipulated that as of the present
5 date plaintiff has a life expectancy of twenty-five years.
6 This fact may be considered by you in arriving at the amount
7 of damages, if any, to be awarded.

8 Life expectancy is merely an estimate of the
9 probable average remaining life of all persons in the United
10 States of a given age and sex, and the estimate is based on
11 the record of experience. So the inference that may reasonably
12 be drawn from life expectancy applies only to one who
13 has the average health and exposure to danger of people of
14 that age and sex.

15 In determining the reasonably certain life expectancy
16 of the plaintiff you should consider in addition to
17 counsel's stipulation all other facts and circumstances in
18 evidence in the case bearing upon the plaintiff's life expectancy,
19 including his occupation, habits, past health record
20 and state of health at the time of his injury.

21 Life expectancy is not the same as work life expectancy.
22 Work life expectancy is the probable average period of
23 time a given person can be expected to work, since some people
24 will retire before they die and others will die while still
25 at work. Work expectancy, or work life expectancy is shorter

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2 than life expectancy. These should be factors which you will
3 take into consideration when, as and if you reach the ques-
4 tion of damages.

5 There has been testimony that the plaintiff has
6 a condition of the back called disc degenerative disease or
7 degenerative disc disease. I heard it both ways, and I may
8 have heard it correctly both ways. The problem is in the back
9 between something the doctors called the L-4 and L-5, which,
10 as I understand it -- and you heard the testimony as well
11 as I -- is a portion of the spine in the back of your body.

12 There has been testimony that the plaintiff has
13 such a condition, and there has been evidence presented that
14 the plaintiff had this condition prior to the time of the
15 injury for which he is now suing.

16 If you find from a preponderance of the evidence
17 that before these events of May 21, 1969, the plaintiff
18 suffered no pain or disability, or if you find that any
19 bodily condition from which he suffered before the injury
20 aggravated as a result of his injury, then the plaintiff is
21 entitled to recover for this aggravation to the same degree
22 as if the entire disability originated completely from the
23 events that happened on May 21, 1969.

24 On the other hand, if you find that the plaintiff
25 has not proved by a preponderance of the evidence that the

2 accident sued on caused an aggravation of his pre-existing
3 condition, you may not award damages for any losses that
4 flow or arise from the pre-existing disability or injury.

5 You must also consider in connection with damages,
6 if you reach that point, the fact that each person who sues
7 to recover damages which he claims were caused by another, has
8 a legal duty to keep those damages to a reasonable minimum.
9 He is compelled, if he claims the loss of wages, to make
10 reasonable efforts to secure work.

11 Taxes: what about taxes? If you arrive at a verdict in
12 favor of the plaintiff, you will not add any sum of money
13 to the amount of the verdict on account of federal or state
14 or city income taxes, since the amount awarded to the plain-
15 iff by your verdict is not taxable income to the plaintiff
16 within the meaning of these tax laws.

17 The mere fact that I have given you charges on the
18 law of damages and on other matters does not in any way sug-
19 gest that I believe that any damages are due in this case.
20 Whether or not the plaintiff is entitled to recover and
21 whether or not any damages are due is for you and you alone
22 to decide.

23 If in the course of your deliberations your recol-
24 lection of any part of the testimony should fail or you should
25 find yourselves in doubt concerning my instructions to you on

2 the law, it is your privilege, if you so desire, to send out
3 a note. We will arrange for you to return to the courtroom
4 for the purpose of having such testimony or instructions read
5 to you.

6 The manner in which you communicate with me is for
7 your forelady to send out a note, and I will try to respond
8 to your request as promptly as possible.

9 In making the factual determinations on which your
10 verdict will be based, you may consider only the exhibits
11 which have been admitted in evidence and the testimony of the
12 witnesses as you have heard it from the witness stand in
13 this courtroom. However, arguments, remarks in summation
14 of the opposing attorneys are not evidence, nor is anything
15 that I say now or may have said with regard to the facts
16 evidence.

17 In this case, the first six of the jurors will
18 constitute the jury, and when I finish my charge, I will be
19 excusing our two alternate jurors.

20 In this case, a unanimous verdict of the six of you
21 is required.

22 In reaching your verdict, you are not to be
23 affected by sympathy for either of the parties, what the re-
24 action of the parties is or of the public to your verdict
25 may be, whether it will please or displease anyone, be pop-

2 ular or unpopular, or, indeed, any consideration outside of
3 the case as it has been presented to you in this courtroom.
4 You should consider only the evidence, both the testimony
5 and the exhibits, find the facts from what you consider to
6 be the believable evidence and apply the law as I have given
7 it, to you to the particular facts as you find them.

8 As I have said before, your verdict will be deter-
9 mined by the conclusion thus reached, no matter whom the
10 verdict helps or hurts.

11 I have now outlined for you the rules of law ap-
12 plicable to this case and the processes by which you weigh
13 the evidence and determine the facts. In a few minutes, you
14 will retire to the jury room for your deliberations. As I
15 have indicated, Mrs. Lerner, who sits in seat number one,
16 will serve as the forelady of this jury. In order that your
17 deliberations may proceed in an orderly fashion, the fore-
18 lady will chair the deliberations, but of course her vote
19 is entitled to no greater weight than that of any other
20 juror. Each of you has one vote, and your vote, that is,
21 the vote of each of you, is entitled to equal weight as you
22 sit around the table to discuss the case.

23 Your function -- to reach a fair conclusion from
24 the law and the evidence -- is an important one. This case
25 is an important one. It is important to the plaintiff; it is

2 important to the defendant, and, as I have observed you each
3 day, it has been treated the same way by you, and, of course,
4 it should continue to be treated the same way by you.

5 When you are in the jury room, listen to each
6 other; discuss the issues and the evidence in the case among
7 yourselves. Remember in your deliberations that the dispute
8 between these parties is for them no passing matter. They
9 and the Court rely upon you to give full and conscientious
10 deliberation and consideration to the issues and evidence
11 before you. By so doing you carry out to the fullest your
12 oaths as jury men and women to well and truly try the issues
13 of this case and a true verdict render.

14 At this time, Miss Kruger, would you hand the ver-
15 dict form to the forelady.

16 The form which I have just had handed to your
17 forelady contains a total of seven questions. Counsel for
18 each side has one of these verdict forms. The questions, in
19 summary, are:

20 1. Whether or not the plaintiff has sustained his
21 unseaworthiness claim.

22 2. Whether or not the plaintiff has established his
23 negligence claim.

24 3. If you answer both of the first two questions
25 "No", put an X at this point, and you stop.

Assuming that you answer one or the other of the first two questions in the affirmative, the fourth question calls upon you to put down the total dollar amount of damages which you wish to award or feel should be fairly awarded to the plaintiff.

The fifth question requires you to answer yes or no as to whether you find the plaintiff to have been contributorily negligent and whether his negligence was a proximate cause of the accident.

The sixth question provides that if you found "Yes" in number 5, that you compute the percentage the plaintiff's fault contributed to the accident, and then you would figure the equivalent dollar amount that would be a percentage of the prior figure, and you put that in.

The last question is an arithmetic one. It requests that you subtract any reduction of the award for contributory negligence from the award itself and place on the bottom line the net recovery which you believe to be fair reasonable.

When you have completed the appropriate questions on the verdict form, you will advise the marshal who will attend you that you have reached a verdict, and at that time you will be asked to enter the courtroom and to indicate to us what your verdict is.

1 Excerpts from Minutes showing Frequency of Jury's
2 Return To The Courtroom For Further Instructions.
2 (The deputy marshal was duly sworn.)

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3 THE COURT: At this time, the Court will instruct
4 the jury to proceed to the jury room and to commence its
5 deliberations.

6 May I again remind you that those deliberations
7 should be conducted with all jurors present, so if anyone
8 wants to stop for a moment before you begin your delibera-
9 tions, to take care of personal needs, I suggest you do that,
10 and then gather around the table and deliberate.

11 You may now discuss the case fully and completely.
12 Thank you very much.

13 (At 2:40 p.m., the jury retired, in the custody of
14 the deputy marshal, to commence deliberating upon a
15 verdict.)

16 THE COURT: At this point, I would like on behalf
17 of the Court, and I am sure on behalf of counsel and the
18 parties, to thank and excuse our two alternate jurors. You
19 have been here for the entire time. I would suggest that it
20 is a frustrating experience to have to say good-bye to your
21 colleagues when they get to the dessert course in the menu,
22 but it is most essential that we have alternate jurors avail-
23 able. On more than one occasion I have found it necessary to
24 press one into service. I have never, as far as I recall,
25 had to press all my alternates into service, but at least

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2 one has been used on several occasions, so that it is most
3 important that we have you available. I am only sorry that
4 I could not send you into the jury room to deliberate with
5 the six regular jurors, but at this point, Miss Quinn and Mr.
6 Waring, on behalf of the Court, I should like to thank you
7 for your five days of service on this case and to excuse you.

8 Miss Kruger will indicate where and what you do from
9 this point on.

10 THE CLERK: Will you please return to Room 109.

11 THE COURT: Perhaps you will be back with me to-
12 morrow. I am supposed to start another case. So maybe
13 you will get to be in the regular jury on that one.

14 Good luck to you both.

15 (The alternate jurors were excused and left the
16 courtroom.)

17 THE COURT: We will now recess court during the
18 jury deliberations.

19 (Recess.)

20 (At 3:00 p.m.:)

21 THE COURT: I understand that a note has been sent
22 out by the jury. I have the note in my hand, and I will
23 read it:

24 "The jury requests to hear the testimony of Mr.
25 Scott and Mr. Guyon with respect to their accounts of

2 the accident."

3 I would ask Miss Kruger to mark this first note
4 from the jury as Court's Exhibit 1.

5 (Court's Exhibit 1 marked for identification.)

6 THE COURT: Mr. Reporter, do you have the appropriate
7 portions of the testimony available to read?

8 THE REPORTER: I have, your Honor.

9 THE COURT: All right. Bring in the jury, and I
10 will direct the reporter to read from the testimony, and I
11 will inquire of the jurors whether this is the portion which
12 they wish to have.

13 (Jury in box:)

14 THE COURT: I have your note. The court reporter
15 has checked his own notes and indicated to me that he has the
16 portion which you wish to have read of the testimony of Mr.
17 Scott and Mr. Guyon.

18 The reporter will read what he believes you want.
19 If you have heard what you want to hear when he is finished,
20 fine. If he has not read to you all that you expected to hear,
21 I will inquire at that time, and we will go further.

22 (Record read.)

23 THE COURT: If you should want any other testimony,
24 you might just want to write a note right now, while you are
25 here, and I will be very happy to oblige you if something

2 else is desired by any of the jurors.

3 All right. That completes the reading of the
4 testimony of Mr. Green and Mr. Scott. I will first ask the
5 jurors if there is any additional testimony that they wish
6 read that may not have been read of either of those gentleman.

7 All right. No one seems to require any additional testimony
8 now. Is there any other testimony that you wish to have
9 read, or do you wish to return to continue your delibera-
10 tions?

11 All right. The jurors indicate they wish to return
12 to continue their deliberations. The Court and counsel will
13 remain available should there be any additional requests.

14 (At 3:30 p.m., the jury retired to resume deliber-
15 ating upon a verdict.)

16 (At 4:15 p.m.:

17 THE CLERK: "The jurors would like to see the
18 medical records from the Staten Island Hospital."

19 (Court's Exhibit 2 marked for identification.)

20 THE CLERK: The exhibits have been sent in to the
21 jury room.

22 (At 5:00 p.m.)

23 THE CLERK: "The jury wants the Miami, Florida,
24 and New Orleans records.)

25 (Court's Exhibit 3 marked for identification.)

2 THE CLERK: The exhibits have been sent in to the
3 jury room.)

4 (At 5:55 p.m.:)

5 (Jury in box:)

6 THE COURT: Ladies and gentlemen, you have been
7 deliberating for about three hours, and I note the time,
8 which is going on six o'clock. I have consulted with counsel,
9 and all of us feel that it might be appropriate for me to
10 suggest that you may want to recess now and return to continue
11 your deliberations tomorrow morning.

12 You are still on your regular term of jury service,
13 so unless you have a very strong feeling to the contrary, it
14 would be my suggestion that we gather up the material that
15 you have been working on and that we recess now until tomor-
16 row morning.

17 Would that suit the jury as a group? I see every-
18 one nodding their heads in the affirmative. I am sure you have
19 put in a busy day. It is good to get a good night's sleep
20 and then return.

21 Let me see your preference. The question is:
22 9:30, which would be my preference, or ten a.m. Who is for
23 9:30? Again, a unanimous jury. Excellent.

24 We will recess now, and you will return here to
25 continue your deliberations in the jury room tomorrow morning

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2 at nine-thirty. I will be available to you beginning at
3 that hour, and counsel will be available as well.

4 Let me caution you that you should not speak with
5 anyone, at home or on the way home or on the way back here,
6 regarding this case. You should only resume your delibera-
7 tions when you are all together, tomorrow morning. So if you
8 see to it first that Miss Kruger receives the exhibits, and
9 if, Madam Forelady, you would like to place your verdict
10 form in a sealed envelope and leave it with Miss Kruger, she
11 will give it to you first thing in the morning.

12 Is that satisfactory? Just be sure it is sealed.

13 THE FORELADY: May I ask a question?

14 THE COURT: Yes. I think that would be appropriate.
15 Is that all right with counsel?

16 MR. SCHWARTZ: Absolutely.

17 THE FORELADY: Is it possible for the jury to ob-
18 tain any factual information that was not brought out in
19 testimony in court?

20 THE COURT: No, no. That is a question I know I
21 sometimes get from jurors after the case.

22 You now have a record as such, and in essence it
23 constitutes the four corners of the case, and just as I
24 admonished you not to discuss the matter with anyone, so that
25 no extraneous information comes to you, I must tell you that

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2 started, and it will be sent in to you.

3 Is there anything else before we recess for this
4 evening?

5 THE FORELADY: No.

6 THE COURT: I have watched this jury, and I know
7 that you have listened diligently, and I am certain that you
8 have conducted your deliberations in the manner you should,
9 which is give and take among yourselves in an attempt to reach
10 a fair and just verdict.11 So with the admonition again that you not discuss
12 the matters at hand with anyone, we will recess court at this
13 time and hope that you all get home safely. We have what
14 may be a half hour of daylight left. Get home safely, and I
15 will be here available to you when you return in the morning
16 to continue your deliberations tomorrow.

17 (Adjourned to January 9, 1974, at 9:30 a.m.)

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2 NIKE O'HARA

3 VS

70 Civ 4011

4 MOORE-McCORMACK LINES, INC.

5 New York, N. Y.

6 January 9, 1974 - 9:30 a.m.

7
8 (Trial continued:)

9 (At 9:45 a.m.:)

10 THE CLERK: We have a note from the jury. It
11 reads:12 "May we hear the Judge's charge with respect to the
13 definition and proof of negligence."

14 (Court's Exhibit 4 marked for identification.)

15 (At 10:10 a.m.:)

16 THE CLERK: We have another note from the jury. It
17 reads:18 "May we have Plaintiff's Exhibit 9 and Defendant's
19 Exhibits F, G and H."

20 (Court's Exhibit 5 marked for identification.)

21 THE COURT: Bring the jury in.

22 (Jury in box:)

23 THE COURT: I would like to commend this jury as
24 well as counsel. I know you have been in there deliberating
25 since early this morning, and I think it is consistent with

2 the manner in which you have performed your duties in this
3 case, and I really appreciate it, and I am sure that the rest
4 of us do, as well.

5 I have two notes which have come from the jury.

6 The first is marked Court's Exhibit 4 and reads as follows:

7 "May we please hear the Judge's charge with respect
8 to the definition of and proof of negligence."

9 Second, which is now marked Court's Exhibit 5:

10 "May we have Plaintiff's Exhibit Number 9" --

11 -- which is the Moore-McCormack ship's medical log,
12 and which is in evidence,

13 -- "and Defendant's Exhibits F, G and H."

14 Those are specific entries from the same log.

15 Those were in evidence. I would have the record reflect
16 they have been sent in to the jury pursuant to the stipulation
17 between counsel that the jury might receive any exhibits which
18 it desired to have.

19 Have counsel prepared the list of exhibits that we
20 discussed last night?

21 MR. SCHWARTZ: Yes, Judge. We both --

22 THE COURT: Do you have them here?

23 MR. REILLY: They have been given to the jury.

24 THE COURT: They have been given to the jury? Very
25 good. I was unaware of that, but that is what I had requested

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2 counsel to do.

3 Now we will turn to your request, which is Exhibit
4, to hear the charge with respect to the definition and
5 proof of negligence.

6 I give you a choice. If you would like to hear it
7 from our very capable court reporter, he will do it, and if
8 you would like to hear it from me, I will do it. I think I
9 can do it conveniently, because I have it before me.

10 If the jury wants more than I read, I will give
11 you more.

12 This is in response to your request that I repeat
13 that portion of my charge regarding definition and proof of
14 negligence.

15 Let's consider the plaintiff's claim for negligence
16 under the Jones Act. In order to recover, the plaintiff must
17 prove that his employer was negligent. Then the question you
18 must first consider, therefore, is, what is negligence?

19 Negligence is the doing of some act that a reason-
20 ably prudent person would not do or the failure to do some-
21 thing which a reasonably prudent person would do under the
22 same or similar circumstances. It is, in other words, the
23 failure to use ordinary care under the circumstances.

24 The mere occurrence of an accident, of course,
25 does not raise any presumption of negligence.

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2 That is the definition of negligence which I gave
3 you previously. If that is all that you wanted, I will stop
4 there. If you want me to go further with my charge, I would
5 be happy to continue with my charge at this point.

6 Let me ask you: have I read to you all that you
7 want, or would you want me to continue with my charge?

8 I see Juror Number 6 has raised his hand.

9 JUROR NUMBER 6: I would like to hear the rest of
10 it, your Honor.

11 THE COURT: You would like me to continue?

12 JUROR NUMBER 6: Yes, sir.

13 THE COURT: All right. I will continue.

14 The obligation of a ship owner under the Jones Act
15 for the safety of seamen is substantially greater than that
16 of an ordinary employer to his employees. The word
17 "Negligence", therefore, as used in the Jones Act, which makes
18 the employer of seamen liable for his negligence, must be
19 given a liberal interpretation. It includes any breach of any
20 obligation that the employer owes to seamen, including the
21 obligation of seeing to the safety of the crew.

22 Under the Jones Act, if the employer committed some
23 act or omission that played any part, no matter how small,
24 in actually bringing about or causing injury to Mike O'Hara,
25 then you should find that the employer was negligent.

2 Negligence, under the Jones Act, may consist of a
3 failure to comply with a duty required by law. Employers
4 of seamen have a legal duty to provide their employees with
5 a safe place in which to work. If you find that in this case
6 the plaintiff was injured because the defendant failed to
7 furnish him with a reasonably safe place to work and that
8 the plaintiff's working conditions could have been made safe
9 through the exercise of reasonable care, then you may find
10 that the defendant was negligent.

11 An employer is legally responsible for the negligence
12 of its employees while acting within the course and scope of
13 their jobs. It is not necessary to show that the management
14 or officers of the employer company were themselves negligent
15 in any way for it to be responsible.

16 There is one other aspect of negligence, which
17 appears later in my charge, which I think for the sake of com-
18 pleteness might be given to you at this time. It is what was
19 called comparative negligence, and I charged you as follows:

20 The defendant here contends the plaintiff was him-
21 self negligent and that that negligence caused his injury.
22 This is a defense, and the burden of proving the plaintiff
23 was negligent is on the defendant. But the fact that the
24 plaintiff's acts may have contributed to causing his accident
25 and injury does not prevent his recovery of damages. In suits

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2 like this one, you are required to find whether the plaintiff
3 was guilty of contributory negligence and, if so, what per-
4 centage his contributory negligence contributed to the accident.
5 But this does not prevent his recovery. It only reduces the
6 amount.

7 Now, you will recall, now that you have had the
8 verdict form in the jury room, there is an area in the middle
9 of that questionnaire which gets to this point, and I think
10 you can relate what you have before you in the jury room to
11 what I have just said.

12 Let me go on, back to my charge:

13 If you find that the accident was due partly to the
14 fault of the plaintiff and you find that his negligence was
15 ten per cent responsible for the accident, then you would fill
16 in this information on the special interrogatories, the ver-
17 dict form that I give you.

18 Obviously, by using the number, ten per cent, I do
19 not mean to suggest any amount. You might find zero per cent
20 or one per cent or ten per cent or one hundred per cent.

21 On the special verdict form I gave you, there is a
22 blank for you to insert your findings in this regard. What-
23 ever amount you find will not prevent the plaintiff from
24 recovering. You merely reduce the damages that you find proper
25 by the percentage that you insert.

2 I would just turn to the jurors and ask if by reading
3 from my charge I have answered your question, which is
4 contained on Court's Exhibit 4, which is:

5 "May we please hear the Judge's charge with respect
6 to definition of and proof of negligence."

7 I see each and every one of the jurors has nodded
8 his or her head, and I will assume that I have now fulfilled
9 the jury's request.

10 Is there anything else you wish to take up with
11 the Court before you return to your jury room?

12 MR. SCHWARTZ: Judge, may I approach the bench?

13 THE COURT: You may.

14 (At the side bar:)

15 MR. SCHWARTZ: The thought occurred to me whether
16 within the negligence which they inquired about, whether the
17 question of unseaworthiness was included.

18 THE COURT: Well, they didn't ask for it. You see,
19 the thing is, I don't think it is inadvertent. The verdict
20 form is very clear relative to the two things being separately
21 considered.

22 I will show you the note again. I feel that I have
23 complied with the jury's request.

24 MR. REILLY: I think so, your Honor.

25 MR. SCHWARTZ: Yes; I think so, in that regard. It

2 just occurred to me that, being laymen, they would have meant
3 the whole thing, and that would have been unseaworthiness
4 also.

5 THE COURT: I suggest this: their note said "negli-
6 gence". When I read the portion of my charge, there was an
7 indication that they wanted more, and I continued, and I
8 read every portion of the charge that I knew of which related
9 to the subject. At that point, the jury indicated they had
10 heard what they wanted to, and, under the circumstances, I
11 would decline to charge further.

12 MR. SCHWARTZ: Exception.

13 THE COURT: You have an exception. All right.

14 MR. SCHWARTZ: For the record.

15 (In open court:)

16 THE COURT: All right. We have just had a short
17 side bar conference, and we all agree that the fact that the
18 jurors have shaken their heads in the affirmative indicates
19 that they have what they want now.

20 We are here, and we await you. If there is anything
21 else you have in the way of a question, do not hesitate to
22 ask it. We will keep an eye on the time only with the view
23 that if I find you are deliberating into the lunch hour, if
24 you do think you are going to go that long, you might indicate
25 to me whether you would prefer sandwiches to be brought in or

2 to be taken out.

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3 Let me suggest this: If you are still deliberating
4 by twelve o'clock, which is a full hour and a half from now
5 -- I don't know whether you will or won't -- that you prepar-
6 a list indicating what you would like to have, and we will
7 see to it that you get it. However, if you complete your de-
8 liberations in the interim period, then, under the circum-
9 stances, obviously, the case will be at an end.
10

I will leave that to your judgment, and will do
11 whatever suits the jury's pleasure in this regard.
12

The jury is requested to return to the jury room
13 to resume their deliberations.

14 Thank you.

15 (At 10:30 a.m., the jury left the courtroom to
16 resume deliberating upon a verdict.)
17

(At 12:00 m.:)

18 THE COURT: Gentlemen, it is now twelve noon. I
19 have indicated to the jury that I am excusing counsel until
20 two p.m., and I am available at this time should the jury
21 have any questions.

22 The marshal has indicated to me the jury has no
23 questions, and therefore we will recess court, and counsel are
24 excused until two p.m. and directed to return at that time.
25

Is that satisfactory?

2 MR. SCHWARTZ: Yes, Judge.

3 MR. REILLY: Very good. Thank you, your Honor.

4 (A luncheon recess was taken.)

5 ---

6 A F T E R N O O N S E S S I O N

7 2:00 p.m.

8 (Jury in box:)

9 THE COURT: Good afternoon, ladies and gentlemen.

10 I can only suggest that the weather has not improved
11 since you arrived this morning, and it seems to be fairly
12 nasty out, and I think we are going to have this with us for
13 a while.

14 I understand that the jury has agreed upon a verdict

15 THE FORELADY: Yes; it has, your Honor.

16 THE COURT: And do you have the sealed envelope
17 containing the verdict?

18 THE CLERK: I have, your Honor.

19 THE COURT: Would you hand it to the forelady and
20 have her open the envelope, and you can address the forelady
21 with your usual questions, Miss Kruger.

22 (Roll of jurors called; all answered present.)

23 BY THE CLERK:

24 Q Madam Forelady, has the jury agreed upon a verdict?

25 A We have.

MOTION TO SET ASIDE VERDICT

* * *

THE COURT: The Court will now hear any motions which
counsel wish to make.

MR. SCHWARTZ: On behalf of plaintiff, I wish to
move to set aside the verdict as against the weight of evi-
dence and upon the ground of gross inadequacy.

Does your Honor want me to go into the details of
it at this time?

THE COURT: I suggest that you do it, and then I
will hear from Mr. Reilly.

MR. SCHWARTZ: We had on the question of liability
a man who was standing still on the escalator. There was no
testimony to the contrary. There isn't one iota of evidence
in the entire case that indicates that this man did anything
that could possibly, by the longest stretch of the imagina-
tion, say that he possibly contributed to this situation.

Where and how could anybody dream up contributory
negligence except as a figment of their imagination, which has
nothing to do with any evidence in the record at all?

2 As far as the amount is concerned, the testimony of
3 their own doctor, Dr. Balensweig, stated that in this case
4 the accident aggravated his disc condition, and he also testi-
5 fied that he had a permanent condition.

6 The testimony shows that at the time of this acci-
7 dent the man was symptom free, but even if he wasn't, the
8 testimony nevertheless is that this accident rendered him
9 disabled for the remainder of his life on the question of the
10 back condition.

11 Now, we've got this question of the head. There
12 was nobody who stated that this man was not unconscious as
13 a result of this accident, and everybody testified that he
14 was. And what do we find? A continuous period of treatment
15 from the very moment of this accident, when the man was helped
16 from the ground into a wheel chair and couldn't even get up
17 by himself after he regained consciousness.

18 He was taken to the hospital, and the ship arrived
19 on the 23rd; the very next day, the man is at the Public
20 Health Service, where it shows a period of continuous treat-
21 ment as far as the head is concerned, where it shows that the
22 man suffered blackouts, which went in at the time as part of
23 the treatment and history, where there could be no possible
24 thought that anybody is making up a statement that the man had
25 blackouts and continuously. I mean, there was no lawyer in the

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2 case, nothing.

3 He had headaches from the very moment, dizziness
4 from the very moment, for which he was given treatment con-
5 tinuously.

6 I won't go into the question of whether he suffered
7 traumatic epilepsy. All right. That could be a question of
8 fact, so the jury resolved it against him. But nevertheless,
9 on a question of continuous suffering and treatment, it shows
10 throughout, continuously, that this man suffered severe head-
11 aches and dizziness, which, wherever he went, whether it was
12 Miami or Louisiana, New York, Brooklyn, Staten Island, shows
13 a continuous condition of the headaches.

14 There is no question about the loss of earnings.
15 Certainly in that '69 period, which is shown both by the
16 records of the defendant and the income tax report of the
17 plaintiff, which was not contradicted in any manner, shape or
18 form.

19 No matter what one would allow, to what extent,
20 taking it all together, to arrive at a ridiculous amount of
21 this -- I say that with all the sincerity that I can command,
22 whatever the event or what it may have been that produced
23 this figure had nothing to do with the facts and testimony in
24 this case.

25 If there ever was a case that indicated a miscarriage

2 of justice on the question of amount and with the contributory
3 negligence fault combined, contributory negligence of seventy-
4 five per cent -- It showed that the jury did not consider the
5 facts of this case, because where did they get that from?
6 Not from this record. I can't possibly conceive it, and I
7 am positive that on the evidence of this case the jury did
8 not go according to the evidence in this case.

9 Whatever they were doing in the jury room did not
10 deal with the facts and evidence of this case. It couldn't.
11 How could they get seventy-five per cent contributory negli-
12 gence of the plaintiff?

13 That is an illustration of what went on, and I
14 respectfully request this Court to set aside the verdict.

15 THE COURT: Mr. Reilly?

16 MR. REILLY: As I understood the plaintiff's case,
17 your Honor, he described to the jury the way he positioned
18 himself on the escalator, with one foot raised above the
19 other foot rather than two feet on the same step of the es-
20 calator while he was carrying a tray of glasses, I think it
21 was.

22 The jury didn't leave their experience outside the
23 courtroom. The escalator was described as the same type of
24 escalator that you see in a department store, and the jurors
25 were well aware of how you were to ride on such an escalator.

2 Further than that, the plaintiff said that the
3 escalator came to a stop, and two seconds later it resumed at
4 the same speed, its normal rate of speed.

5 So I urge that the jury accepted the plaintiff's
6 version of the accident, and they knew that if he had been
7 holding properly to the hand rail on the escalator he would
8 not have fallen.

9 With regard to the items of damage, we rejected the
10 head injury, I believe, by our neurosurgeon, Dr. Kirshenbaum,
11 out of hand. The Public Health Service found Mr. O'Hara
12 fit for duty neurologically in September of 1969. The
13 testimony of Dr. Balensweig was to the effect that if the
14 accident was an aggravating feature of the back case, the
15 plaintiff would have recovered from the effects of the acci-
.6 dent again in the fall of 1969.

17 I urge, your Honor, that the determination of liabil-
18 ity as well as the amount of damages is well within the
19 province of the jury, and I urge that the plaintiff's motion
20 be denied.

21 THE COURT: The Court concludes that there is suf-
22 ficient evidence in the record to support the jury's verdict.
23 In addition, the Court observes that the jury did appear to
24 understand the case. They dealt first with questions of
25 liability, returning shortly after they had begun their

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) : ss.:

Harry Malinowitz being duly sworn, deposes
and says that he is employed by JACOB RASSNER, attorney
for the above named Plaintiff Appellant herein.

That on the 25th day of October, 1974, he
served the within Appendix upon Hyde,
Dickinson, & Reilly the attorneys for the above named
Defendant Appellee, by depositing a true copy of the same
securely enclosed in a post-paid wrapper at an Official
Depository maintained and exclusively controlled by the
United States at 15 Park Row, New York City, N. Y., direct-
ed to said attorney for the Defendant Appellee, at No.
61 Broadway, New York, N. Y.,
that being the address within the state designated by them
for that purpose upon the proceeding papers in this action,
or the place where they then kept an office between which
places there was then and now is a regular communication by
mail.

Deponent is over the age of 18 years.

Sworn to before me this
28th day of October 1974.
Allen Bernard

